

**BEFORE
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NOS. 2010-14 --19-C**

IN RE:)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v.)
Affordable Phone Services, Incorporated)
d/b/a High Tech Communications)
Docket No. 2010-14-C)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v. Dialtone)
& More Incorporated)
Docket No. 2010-15-C)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v.)
Tennessee Telephone Service, LLC)
d/b/a Freedom Communications USA,)
LLC)
Docket No. 2010-16-C)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v. OneTone)
Telecom, Incorporated)
Docket No. 2010-17-C)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v. dPi)
Teleconnect, LLC)
Docket No. 2010-18-C)
)
BellSouth Telecommunications,)
Incorporated d/b/a AT&T Southeast)
d/b/a AT&T South Carolina v. Image)
Access, Incorporated d/b/a New Phone)
Docket No. 2010-19-C)

**RESELLERS' RESPONSE TO
AT&T'S NOTICE OF SUBSEQUENT
DEVELOPMENT**

Affordable Phone Services, Incorporated d/b/a High Tech Communications, Dialtone & More, Incorporated, Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC, OneTone Telecom, Incorporated, dPi Teleconnect, LLC, and Image Access, Incorporated d/b/a New Phone (collectively, the “Resellers”) respectfully submit this Response to BellSouth Telecommunication, LLC d/b/a AT&T South Carolina’s (“AT&T”) Notice of Subsequent Development filed with the Public Service Commission of South Carolina (the “Commission”) on March 5, 2012, informing the Commission of the issuance of an Order by the Kentucky Public Service Commission (the “KPSC”) on March 2, 2012, a copy of which is attached to AT&T’s Notice of Subsequent Development as Attachment A (the “KPSC Order”).

RESPONSE OF RESELLERS

The KPSC Order denies dPi Teleconnect, LLC’s (“dPi”) Motion for Reconsideration of the KPSC’s January 19, 2012 Order in the same proceeding. In the instant KPSC Order, the KPSC relies on the recent Order by the United States District Court for the Eastern District of North Carolina (Western Division) in *dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina, et al.*, No. 5:10-CV-466-BO (the “NC Order”) in support of its denial of dPi’s Motion for Reconsideration.¹ AT&T recently filed a similar Notice of Subsequent Development in this docket on February 21, 2012 informing the Commission of the issuance of the NC Order, to which the Resellers responded by filing their Response to AT&T’s Notice of Subsequent Development on March 2, 2012 (the “Reseller Response”).

For the same reasons that the NC Order’s rationale and interpretation of *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 447 (4th Cir. 2007) is misguided, as more fully set forth in the Reseller Response, the KPSC Order is similarly misguided for relying on the NC Order in

¹ See KPSC Order, p.4.

support of its denial of dPi's Motion for Reconsideration.

As previously stated in the Reseller Response, despite the fact that the NC Order states that its ruling is guided by *Sanford*, the NC Order is instead contrary to the *Sanford* decision. The NC Order cites *Sanford* for the proposition that *Sanford* “requires that the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit of such a reduction be passed on to resellers *by applying the wholesale discount to the lower actual retail price.*”² This is what the Resellers are advocating in the instant proceeding, namely that the Commission's wholesale discount percentage should be applied to reduce the “lower actual retail price” or “promotional rate” created by the cash back offering.

Again, as stated in the Reseller Response, the NC Order's (and the instant KPSC Order's) method of applying the percentage discount *twice*, to both the normal retail rate and the cash back promotion itself (the same approach advocated by AT&T), is clearly not what *Sanford* intends. The *Sanford* decision requires that the percentage discount be applied *once* to “the lower actual retail price”³ (the “promotional rate” referred to in the NC Order) created through the offering of a cash back promotion. The disconnect between the *Sanford* method and the method advocated by AT&T and in the NC Order and KPSC Order arises in cases like those at issue here where the cash back promotion amount exceeds the monthly retail price (*e.g.*, a \$25 service combined with a \$50 cash-back promotion). In these instances, AT&T's methodology creates a *higher* price to resellers (through a smaller bill credit) than the price paid by AT&T's retail customers, which is exactly the outcome that the Fourth Circuit found unreasonable in *Sanford*. Indeed, this approach violates federal law because it does not require AT&T to sell its

² See NC Order, p. 5, citing *Sanford*, 494 F.3d at 443-44.

³ See NC Order, p. Order, p. 5, citing *Sanford*, 494 F.3d at 443-44.

services subject to promotions at a wholesale rate *below* the retail rate.⁴ This methodology also allows AT&T to use promotions to avoid its wholesale obligation in violation of paragraphs 948 and 950 of the FCC’s *Local Competition Order*.⁵ This flaw in AT&T’s method and in the NC Order’s interpretation of *Sanford* has been correctly recognized by this Commission in its Directive issued on November 9, 2011.⁶

CONCLUSION

The Resellers hereby reiterate and re-urge the points set forth in the Reseller Response regarding the flaws in the NC Order. For the same reasons, and for the reasons stated herein, the KPSC Order is similarly flawed in its reliance on the NC Order. The Resellers respectfully request that the Commission consider the foregoing when rendering a decision on the issues presented in this consolidated proceeding.

⁴ See, e.g., 47 C.F.R. § 51.607. “The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, *less avoided retail costs*, as described in section 51.609.” [Emphasis added.]

⁵ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499 at ¶¶ 948, 950 (rel. Aug. 8, 1996) (“*Local Competition Order*”) (emphasis added).

⁶See Commission Docket Nos. 2010-14-C, 2010-15-C, 2010-16-C, 2010-17-C, 2010-18-C and 2010-19-C, Commission Directive dated November 19, 2011 (the “Commission Directive”), pp. 1-2.

Cash Back Offers. These are rebates to the purchasing consumer that require the purchaser to remain on the BellSouth network for thirty days before the rebate check is forwarded to the customer.

[S]ince the retail customer gets his rebate after keeping the service for thirty days, this Commission finds that thirty days should be the basis for calculating the rebate. ***In the case where the rebate is greater than the first month’s charges, discounting the rebate means that the BellSouth retail customer in effect gets a better price than the CLEC. This is definitely not what we believe the Telecommunications Act of 1996 intended. Therefore, in the special cases where the rebate exceeds the first month’s cost of service, we find that the retail discount should not be applied to [the] rebate.*** [emphasis added]

Respectfully submitted this 19th day of March, 2012.

s / John J. Pringle, Jr.

John J. Pringle, Jr. (SC Bar No. 11208)

ELLIS, LAWHORNE & SIMS, PA

P.O. Box 2285

Columbia, South Carolina 29202

Telephone: (803) 343-1270

Facsimile: (803) 799-8479

jpringle@ellislawhorne.com

COUNSEL FOR AFFORDABLE PHONE SERVICES,
INCORPORATED D/B/A HIGH TECH
COMMUNICATIONS, DIALTONE & MORE,
INCORPORATED, TENNESSEE TELEPHONE
SERVICE, LLC D/B/A FREEDOM
TELECOMMUNICATIONS USA, LLC, ONETONE
TELECOM, INCORPORATED, DPI TELECONNECT,
LLC, AND IMAGE ACCESS, INC. D/B/A NEWPHONE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by electronic mail service on the following this 19th day of March, 2012:

Patrick W. Turner, Esquire
AT&T South Carolina
Pt1285@att.com

Lessie Hammonds, Esquire
S.C. Office of Regulatory Staff
lhammon@regstaff.sc.gov

s / Carol Roof
Carol Roof
Paralegal to John J. Pringle, Jr.